

NOT FOR PUBLICATION -- FOR UPLOAD TO WWW.VID.USCOURTS.GOV

ATTORNEYS :

MEMORANDUM

Defendant Mafolie Foods Company, Inc. ["Mafolie"] has moved to dismiss plaintiff National Fisheries, Inc.'s ["National Fisheries"] action for breach of contract, tortious interference with business relations, and declaratory judgment for lack of subject matter jurisdiction and lack of standing for failure to pay franchise taxes. Mafolie asserts that the Court lacks subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a) because National Fisheries' complaint fails to allege an amount

in controversy exceeding \$75,000, exclusive of interest and costs. Mafolie also argues that the plaintiff cannot bring suit because it has not paid its annual territorial franchise tax.

The Court will deny the defendant's motion to dismiss on both grounds.

I. FACTUAL SUMMARY

National Fisheries is a Florida corporation which supplies wholesale fish and fish products nationwide. In late August 1998, National Fisheries opened a credit account in the name of Mafolie Foods, Inc., a Virgin Islands corporation. Mafolie claims that, concurrent with the opening of this account, National Fisheries agreed that Mafolie would become the exclusive distributor of fish and fish products in the Virgin Islands in exchange for Mafolie's promise to increase National Fisheries' volume of fish sold in the Virgin Islands.

Mafolie began to experience cash flow shortages and ultimately stopped making payments to National Fisheries on fish products it had already received. Because of Mafolie Foods' arrearage, National Fisheries discontinued shipments of fish products to Mafolie and filed a complaint for the amount due. National Fisheries also filed a motion for declaratory judgment for Mafolie not to be entitled to assert to other businesses and

distributors in the U.S. Virgin Islands that it is the exclusive distributor for National Fisheries within the U.S. Virgin Islands. Mafolie responded by filing this motion to dismiss.

II. DISCUSSION

Mafolie's motion to dismiss alleges two grounds for dismissal: (1) lack of diversity jurisdiction under 28 U.S.C. § 1332, and (2) preclusion from filing or maintaining an action in the courts of the Virgin Islands pursuant to V.I. CODE ANN. tit. 13, § 533(a) due to National Fisheries' failure to pay franchise taxes.

A. Diversity Jurisdiction

This Court has jurisdiction over the plaintiff's diversity suit under 28 U.S.C. § 1332. In its motion to dismiss, Mafolie contends that National Fisheries cannot bring suit against it because it has failed to allege a sum or value in controversy exceeding \$75,000, exclusive of interest and cost, as required pursuant to obtaining jurisdiction under 28 U.S.C. § 1332(a). National Fisheries responds that the total value of the matter in controversy exceeds \$75,000.¹

¹ National Fisheries' complaint summarily alleges damages exceeding \$75,000 as a result of the following: Mafolie's breach of contract by failing to pay \$49,847.25 due and owing pursuant to an open account agreement (Count I); tortious interference with business relations, but no dollar amount claimed (Count II). In its Affidavit (of Jack E. Karson) in Support of Plaintiff's Opposition to Motion to Dismiss, National Fisheries estimates the

In diversity cases, a federal district court has "original jurisdiction over all civil actions where the matter in controversy exceeds the sum or value of \$75,000." 28 U.S.C. § 1332(a). The amount in controversy alleged in the complaint suffices to meet the requirements of the statute, "unless it appears to a legal certainty that the plaintiff in good faith cannot claim the jurisdictional amount." See *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938) (dismissal proper where pleadings themselves reveal to legal certainty that plaintiff cannot recover required amounts in controversy). Here, National Fisheries alleges damages exceeding the sum or value of \$75,000, and it does not appear to a legal certainty that National Fisheries cannot recover at least \$75,000. The Court will not dismiss the plaintiff's complaint for lack of diversity jurisdiction.

B. Failure to Pay Territorial Annual Franchise Tax

In its motion to dismiss, Mafolie argues that National Fisheries is precluded, pursuant to 13 V.I.C. § 533(a), from maintaining any action in the courts of this territory due to its failure to pay franchise taxes, which Mafolie contends National Fisheries must pay because it is a corporation doing business in the Virgin Islands. Under the Virgin Islands Corporation

sum or value of the matter claimed in Count II at \$475,000.

Franchise Tax Act ["CFTA"], franchise taxes are due by every local or foreign corporation "qualified to do or doing business in the Virgin Islands." 13 V.I.C. § 531(a). The statute further provides that "[n]o corporation may commence or maintain any action in any court if it has not paid its annual franchise tax last due." *See id.*

1. Plaintiff Was Not Required to Qualify to Do Business in the Virgin Islands

Before a foreign corporation may "do any business in the United States Virgin Islands through or by branch offices, agents or representatives located in the United States Virgin Islands," it must qualify to do so by filing certain documents with the Office of the Lieutenant Governor. *See* 13 V.I.C. § 401(a). Once the filing is complete and the fees paid, the Lieutenant Governor issues a certificate evidencing the right of the non-Virgin Islands corporation to do business here. *See id.* § 401(b). Section 403, however, exempts a foreign corporation from these filing requirements if it is, *inter alia*, "a mail order or *similar business*, merely receiving orders by mail . . . accepting orders outside the Virgin Islands and filling them with goods shipped into the Virgin Islands" *See id.* § 403(1) (emphasis added). The plaintiff provided evidence that it receives and accepts orders and negotiates, reviews and executes

offers and contracts in Florida, and, that it fills those orders and ships them from Florida into the Virgin Islands and elsewhere. The Court finds that the contacts of National Fisheries with the Virgin Islands were those of a business similar to a mail order business under section 403(1). It, therefore, was not required to qualify to do business in this jurisdiction.

2. Plaintiff was Not "Doing Business" in the Virgin Islands

A foreign corporation may be found to be doing business in the Virgin Islands, even if it has not qualified to do business here or is exempted from such qualification. To constitute "doing business," the corporation must conduct in the Virgin Islands "activities which constitute a substantial part of the company's ordinary or customary business." *M & T Mortgage Corp. v. White-Hamilton*, 49 F. Supp.2d 802, 803 (D.V.I. 1999) (quoting *American Fidelity Fire Ins. Co. v. Construcciones Werl, Inc.*, 12 V.I. 325, 367, 407 F. Supp. 164, 188 (D.V.I. 1975)) (emphasis added).

National Fisheries presented uncontested evidence that its shipments into the Virgin Islands have constituted approximately one to four percent of its business in terms of gross billing and revenues. The Court finds that this amount does not constitute a sufficiently substantial part of the company's ordinary or

customary business to subject it to the payment of Virgin Islands' franchise taxes.²

III. CONCLUSION

This Court has jurisdiction over the plaintiff's diversity suit under 28 U.S.C. § 1332. The complaint sufficiently alleges the required amount in controversy. National Fisheries was neither required to qualify to do business nor actually was doing business in the Virgin Islands. It, therefore, was not required to pay the franchise tax, nor is it barred from bringing this lawsuit.

An order denying Mafolie's motion to dismiss has previously been entered.

ENTERED this 20th day of March 2000.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

² National Fisheries, VI, Inc., which defendant asserts was established in the Virgin Islands on November 30, 1998, is not a party to this suit. Further, the defendant does not argue in its motion that the establishment of this separate corporation is a basis for subjecting the plaintiff to franchise tax liability in the U.S. Virgin islands.

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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

NATIONAL FISHERIES, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 1999-141
)	
MAFOLIE FOODS COMPANY, INC.)	
)	
Defendant.)	
)	
)	

ATTORNEYS:

Lori Gilmore, Esq.
St. Thomas, U.S.V.I.
For the plaintiff,

Andrew L. Capdeville, Esq.
St. Thomas, U.S.V.I.
For the defendant.

ORDER

Moore, District Judge

For the reasons set forth in the accompanying memorandum of
even date, it is hereby

ORDERED that the defendant Mafolie Foods Company, Inc.'s
motion to dismiss is **DENIED**.

ENTERED this 20th day of March 2000.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

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ATTEST:
ORINN ARNOLD
Clerk of the Court

By: _____/s/_____
Deputy Clerk

Copies to:

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Lori Gilmore, Esq.
Andrew L. Capdeville, Esq.
Mrs. Jackson
Jeffrey H. Jordan